



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Ms. Cleta Mitchell, Esq.
Foley & Lardner, LLP
3000 K Street, NW
Suite 600
Washington, D.C. 20007

JUN -2 2014

RE: MUR 6380

Dear Ms. Mitchell:

Based on a complaint filed with the Federal Election Commission on September 20, 2010, and information supplied by your client, the Commission, on May 22, 2012, found that there was reason to believe Friends of Christine O'Donnell ("Committee") and Matt Moran, as treasurer, and Christine O'Donnell, violated 2 U.S.C. § 439a(b). After considering all the evidence available to the Commission, the Office of the General Counsel recommends that the Commission find probable cause to believe that the violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. *See* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's

Ms. Cleta Mitchell, Esq.
MUR 6380
Page 2

decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Marianne Abely, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisa J. Stevenson', with a stylized flourish extending to the right.

Lisa J. Stevenson

Deputy General Counsel — Law

Enclosure
Brief

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4)
5 Christine O'Donnell)
6 Friends of Christine O'Donnell and)
7 Matt Moran in his official capacity as treasurer) MUR 6380
8)
9

10 **GENERAL COUNSEL'S BRIEF**

11
12 **I. STATEMENT OF THE CASE**

13
14 This matter was generated by a complaint filed with the Federal Election Commission
15 alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by
16 Christine O'Donnell and Friends of Christine O'Donnell and Matt Moran in his official capacity
17 as treasurer ("Committee"). The Complaint alleged that, in 2010, O'Donnell and the Committee
18 used campaign funds to pay \$20,362.17 in rent and utilities for a Greenville, Delaware
19 townhouse that was used by O'Donnell as her personal residence.

20 On May 22, 2012, the Commission found reason to believe that Christine O'Donnell and
21 the Committee (collectively "Respondents") violated 2 U.S.C. § 439a(b) in connection with the
22 Committee's payment of rent and utilities for the Greenville, Delaware townhouse on
23 O'Donnell's behalf.¹ Based on the following factual and legal analysis, this Office recommends
24 that the Commission find probable cause to believe that Respondents violated 2 U.S.C.
25 § 439a(b).

¹ Factual & Legal Analysis at 6; *see also* Commission Certification ¶ 2(a)-(b), MUR 6380 (Christine O'Donnell, *et al.*) (May 23, 2012).

II. ANALYSIS

A. Statement of Facts

Christine O'Donnell was a candidate for United States Senate from Delaware in 2010, and the Committee served as her principal campaign committee. The available evidence demonstrates that in 2010, the Committee used campaign funds to pay the rent and utilities for a three-bedroom townhouse in Greenville, Delaware, which served as O'Donnell's residence. Specifically, the campaign's disclosure reports indicate that, during the time period January 2010 through September 2010, it disbursed a total of \$16,816.60 for rent on the Greenville townhouse as well as disbursements for electrical power (\$1,030.32), cable (\$1,305.84) and phone (\$1,209.41) for the unit, for a total of \$20,362.17.²

Respondents concede that O'Donnell resided in the townhouse.³ In fact, O'Donnell changed her voting registration residence to the townhouse address on January 12, 2010.⁴ Further, Respondents do not deny that rent and other costs associated with the townhouse were paid for with campaign funds.⁵ According to Respondents, the Committee leased the Greenville townhouse as its headquarters, and O'Donnell and several members of her staff lived on the floors above the campaign offices.⁶ O'Donnell reportedly stated that she paid a portion of the rent on her townhouse with campaign donations because she was using the premises as her

² See 2010 April Quarterly Report at 1, 6, 8, 9, 14 (Apr. 15, 2010); 2010 July Quarterly Report at 39-41, 46-50 (July 15, 2010); 2010 Pre-Primary Report at 43, 44, 51, 52, 56-58 (Sept. 2, 2010).

³ Resp. at 2 (Dec. 3, 2010); Supp. Resp. at 3 (July 22, 2011).

⁴ Compl., Ex. D (Ginger Gibson, *Delaware Politics: O'Donnell Faces Campaign Debt, Back-tax Issues*, THE NEWS JOURNAL (Wilmington), Mar. 21, 2010); see State Election Commissioner Website available at <https://ivote.de.gov/>.

⁵ Resp. at 2; Christine O'Donnell Aff. at 1 (Dec. 2, 2010); Suppl. Resp. at 3.

⁶ O'Donnell Aff. at 1.

1 campaign headquarters, but also stated that she was “splitting it, legally splitting it and paying
 2 part of it . . . I am renting from the campaign”⁷ She also stated that she “personally paid for
 3 my pro-rata share of the rental payments to cover my living costs at the campaign’s premises,
 4 although the campaign paid 100% of the living costs for all other campaign workers sharing the
 5 living quarters with me.”⁸

6 The Committee’s disclosure reports show that, during a 15-month period, O’Donnell
 7 reimbursed the Committee for *part of* the rent and utilities on the residence. Specifically,
 8 O’Donnell reimbursed the campaign a total of \$3,850 for rent and utilities during the relevant
 9 time period. The Committee’s disclosure reports show that O’Donnell made payments of \$770
 10 on: March 30, 2010 (“reimb. for rent”); April 14, 2010 (“rent”); June 28, 2010 (“reimb. from
 11 candidate – rent + utilities”), August 4, 2010 (“rent”), and September 27, 2010 (“Reimbursement
 12 – Rent Fair Market Value.”)⁹ Respondents also produced two of the \$770 reimbursement checks
 13 from O’Donnell to the O’Donnell Committee.¹⁰ The memorandum lines for these checks, dated
 14 March 30, 2010 and June 28, 2010 respectively, indicate that the funds were for rent and
 15 utilities.¹¹

16 Respondents argue that since the Committee leased the Greenville townhouse in its own
 17 name, *i.e.*, they were “campaign leases and *not* residential lease(s) of Christine O’Donnell
 18 personally,” it was lawful for the Committee to pay the rent and utilities as long as O’Donnell

⁷ Compl., Ex. D.

⁸ O’Donnell Aff. at 1.

⁹ See 2010 April Quarterly Report at 28 (Apr. 15, 2010); Amended 2010 July Quarterly Report at 37 (Apr. 15, 2011); Amended 2010 Pre-Primary Report at 44 (Apr. 15, 2011); Amended 2010 October Quarterly Report at 905 (Apr. 15, 2011).

¹⁰ Resp., Exs. 14-15.

¹¹ *Id.*

reimbursed it for her “share” of the costs.¹² Respondents produced the rental application and rental agreement for the townhouse. The “Rental Application,” dated January 4, 2010, identifies the Committee as a “Corporate Applica[nt]” and Robert David Hust as the “Occupant.”¹³ O'Donnell signed (and initialed) the “Rental Agreement” which states that the tenant is “Christine O'Donnell for U.S. Senate (Occupant, David Hust)” as well as the “Progressive Rent Addendum.”¹⁴ The signature lines on these documents identify O'Donnell as “tenant” and “resident,” respectively.¹⁵

B. There is Probable Cause to Believe that the Committee's Payment of Rent and Utilities Constituted a *Per Se* Personal Use Violation

The Act provides that contributions accepted by a candidate may be used by the candidate “for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate”¹⁶ Such campaign funds, however, shall not be converted to “personal use” by “any person.”¹⁷ “Personal use” is defined as the use of campaign funds of a present or former candidate “to fulfill any commitment, obligation or expense of a person that would exist irrespective of the candidate's election campaign or individual duties as a holder of Federal office.”¹⁸ The Act contains a list of examples of personal use expenses that includes, *inter alia*, a home mortgage, rent, or utility payment; a noncampaign-related automobile

¹² *Id.* at 2 (emphasis in original).

¹³ Resp., Exs. 3, 4. In her affidavit, O'Donnell describes Hust as “one of the campaign workers who did, in fact, move into the premises in February, 2010.” O'Donnell Aff. at 1.

¹⁴ *Id.*, Exs. 7.

¹⁵ *Id.*

¹⁶ 2 U.S.C. § 439a(a)(1).

¹⁷ *Id.* § 439a(b)(1).

¹⁸ 2 U.S.C. § 439a(b)(2).

1 expense; a vacation or other noncampaign-related trip; and admission to a sporting event,
2 concert, theater, or other form of entertainment not associated with an election campaign.¹⁹

3 The Commission's regulations also describe uses of campaign funds that constitute
4 personal use *per se*, including in relation to these allegations:

5 (E) Mortgage, rent or utility payments--
6

7 (1) For any part of any personal residence of the candidate or a
8 member of the candidate's family; or
9

10 (2) For real or personal property that is owned by the candidate or
11 a member of the candidate's family and used for campaign purposes, to
12 the extent the payments exceed the fair market value of the property
13 usage.
14

15 (F) Admission to a sporting event, concert, theater or other form of
16 entertainment, unless part of a specific campaign or officeholder
17 activity.²⁰
18

19 O'Donnell used the townhouse as her personal residence. O'Donnell filed an affidavit in
20 this matter acknowledging that she lived in the townhouse, paid rent for the residence, listed it on
21 her voter registration materials, and signed lease documents on behalf of the Committee as

¹⁹ 2 U.S.C. § 439a(b)(2)(A), (C), (E) & (H).

²⁰ 11 C.F.R. § 113.1(g)(1)(i).

“tenant” and “resident.”²¹ The personal use provisions of the Act and its corresponding regulations clearly indicate that the use of campaign funds for rental payments for *any part* of any personal residence constitutes *per se* personal use. Therefore, the regulations do not support Respondents’ argument that the sharing arrangement for the Greenville residence was permissible because O’Donnell reimbursed the Committee her “pro rata share” of the expenses. In its Explanation & Justification for the personal use regulations, the Commission noted that those regulations prohibit this type of allocation: “the rule draws a clear line, and avoids the need to allocate expenses associated with the residence between campaign and personal use.”²² The Commission clarified that the candidate “retains the option of using his or her personal residence in the campaign, *so long as it is done at no cost to the committee.*”²³

In Advisory Op. 2000-2 (Hubbard), the Commission allowed a candidate to pay for office space in the same building as his residence, but noted several factors that made the candidate’s situation “somewhat unique,” including that (1) the use of the leased property as both a residence and an office pre-dated his candidacy by several years; (2) the leased premises were located in a commercial building; (3) the premises served as the candidate’s sole office space and for several

²¹ O’Donnell Aff. at 1 (“... several campaign members and I moved into the townhouse and lived above the office in the upstairs floor of the townhouse.”); Compl., Ex. D. (“On Jan. 12, 2010, O’Donnell changed her Delaware address in the voter registration, according to Elections Commissioner Elaine Manlove. She shares her new residence, a three-bedroom, two-bathroom home in Greenville Place, with David Hust. . . .”); Resp., Ex. 6 (O’Donnell signed Progressive Lease Addendum, dated Jan. 8, 2010, as “resident.”); Resp., Ex. 7 (O’Donnell signed Rental Agreement, dated Jan. 8, 2010, as “resident.”); 2010 April Quarterly Report at 1, 6, 8, 9, 14 (Apr. 15, 2010); 2010 July Quarterly Report at 39-41, 46-50 (July 15, 2010); 2010 Pre-Primary Report at 43, 44, 51, 52, 56-58 (Sept. 2, 2010) (O’Donnell reimbursed the Committee a total of \$3,850 for rent and utilities on the townhouse.)

²² Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities, 60 Fed. Reg. 7863, 7865 (Feb. 9, 1995) (“Explanation and Justification”). *See also* First Gen. Counsel’s Rpt. at 6, MUR 5218 (Francis) (“notwithstanding that part of Francis’ home was used by the campaign . . . it appears that Francis used campaign funds to pay for a *per se* personal use — his mortgage payments”).

²³ E&J, 60 Fed.Reg. at 7865 (emphasis added).

1 years he followed a tax treatment that reflected a division between residential and office space;
 2 and (4) the campaign funds would pay only the portion of rent previously ascribed to the office
 3 use.²⁴ None of those factors are present here.²⁵ O'Donnell's use of the premises as her personal
 4 residence and the Committee's use as a campaign office commenced simultaneously in January
 5 2010 when the townhouse was first rented. Thus, there was no pre-existing division of space
 6 between an office and residence prior to O'Donnell's candidacy or pre-existing tax treatment
 7 reflecting such a division. Further, the townhouse appears to be part of a residential
 8 development, not a commercial space; in fact, the lease signed by O'Donnell is a residential
 9 lease that not only states that tenant shall use the unit "only as a residence and for no other
 10 purpose," but also contains a provision requiring that the premises be used as "as a single family
 11 residence and not for any other purposes."²⁶

12 Respondents contend that an unidentified campaign volunteer cleared the use of this
 13 allocation system with the Committee's RAD analyst.²⁷ The Committee's assigned RAD

²⁴ See Advisory Op. 2000-2 (Hubbard) at 4.

²⁵ The circumstances surrounding the use of the Greenville townhouse are more akin to those Advisory Opinions that were expressly superseded by the 1995 personal use regulations. See, e.g., Advisory Op. 1988-13 (Ray) (superseded) (candidate committee may pay pro rata share of rent and utilities to candidate for campaign office space in candidate's house that was previously shared with a tenant); Advisory Op. 1985-42 (Taylor) (superseded) (candidate committee may pay a portion of candidate's rent where campaign staff periodically use candidate's apartment for lodging); Advisory Op. 1983-01 (Coughlin) (superseded) (candidate committee may pay a portion of the rent of a candidate's residence where a part of the house is used for campaign equipment storage); see also Explanation and Justification, 60 Fed. Reg. at 7865 ("This paragraph supersedes Advisory Opinions 1988-13, 1985-42, 1983-1 and 1976-53, since they allow the use of campaign funds for these purposes.")

²⁶ Resp., Ex. 7, ¶¶ 2, 9(a). The available information indicates that O'Donnell's townhouse which was part of a residential apartment complex, was zoned as a residence. See New Castle County Website available at <http://www3.nccde.org/parcel/Details/Default.aspx?ParcelKey=30404>.

²⁷ E-mail from Cleta Mitchell, Attorney, to Thomas Andersen, Attorney, FEC (July 2, 2012 at 4:36 p.m.); E-mail from Cleta Mitchell, Attorney, to Thomas Andersen, Attorney, FEC (July 2, 2012 at 6:24 p.m.). This assertion was made after the Commission found reason to believe that Respondents violated the Act. On multiple occasions, Respondents stated that they intended to produce an affidavit by the volunteer attesting to the consultation with RAD. To date, Respondents have not produced this affidavit or any other evidence supporting their contention that RAD approved the allocation of expenses associated with the townhouse.


analyst, however, has stated there was no such discussion between her and Committee staff and this purported discussion was not previously mentioned in the Response or Supplemental Response.

In sum, O'Donnell and the O'Donnell Committee used campaign funds to pay \$20,362.17 in rent and utilities on the Greenville townhouse that were O'Donnell's personal obligations, which constituted a *per se* violation personal use violation of 2 U.S.C. § 439a(b).


III. CONCLUSION

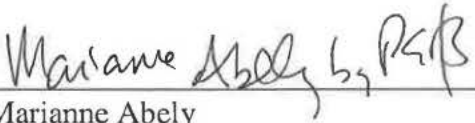
Based on the foregoing, the Office of General Counsel recommends that there is probable cause of believe that O'Donnell and the Committee violated 2 U.S.C. § 439a(b).

6/2/14
Date


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